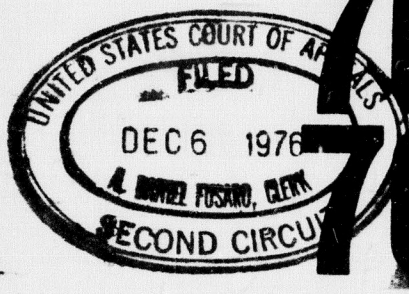
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit



76-6132
76-4223

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-6132, 76-4223

JUAN TOMAS DIAZ-CHANG,

Plaintiff-Appellant,

—v.—

MAURICE F. KILEY, New York District Director of the Immigration and Naturalization Service,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JUAN TOMAS DIAZ-CHANG,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF DEFENDANT-APPELLEE, RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for
Defendant-Appellant Respondent.

THOMAS H. BELOTE,
Special Assistant United States Attorney,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-6132, 76-4223

JUAN TOMAS DIAZ-CHANG,
Plaintiff-Appellant,

—v.—

MAURICE F. KILEY, New York District Director of the Immigration and Naturalization Service,
Defendant-Appellee.

JUAN TOMAS DIAZ-CHANG,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF OF DEFENDANT-APPELLEE, RESPONDENT

Statement of the Issues

1. Whether the District Court erred in dismissing the alien's complaint and denying his motion for a preliminary injunction staying his deportation.

2. Whether the Board of Immigration Appeals erred in denying the alien's motion to reopen his deportation proceedings.

3. Should damages and double costs be imposed on the petitioner (plaintiff-appellee) pursuant to Section 1912 of Title 28, United States Code and Rule 38 of the Federal Rules of Appellate Procedure, inasmuch as this appeal and petition are frivolous and have been interposed merely to frustrate and delay the execution of a valid order of deportation.

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952) as amended

Section 241(a)(2), 8 U.S.C. § 1251(a)(2)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(2) entered the United States without inspection or at any time or place is in the United States in violation of this Act or in violation of any other law of the United States.

Title 28, United States Code, Section 1912.

Section 1912. Damages and Costs on affirmance. Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Relevant Regulations

Title 8 Code of Federal Regulations:

103.5 Reopening or reconsideration [before an Immigration Judge].

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter

may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. . . . If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. . . .

§ 242.22 Reopening or reconsideration [before an Immigration Judge]

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own motion or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. . . . A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; . . .

Relevant Rule

Federal Rules of Appellate Procedure

Rule 38. Damages for delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Statement of the Case*

Appeal No. 76-6132

This is an appeal from the order and decision of the Honorable Robert J. Ward, United States District Judge for the Southern District of New York, dated August 19, 1976 in which he denied the motion of Juan Tomas Diaz-Chang ("Diaz") for a preliminary injunction further staying Diaz' deportation and dismissed the underlying action. In that District Court action Diaz, a concededly deportable alien, sought declaratory relief such that his deportation could be stayed pending a decision by the Board of Immigration Appeals on his motion to reopen his deportation proceedings. Noting that "the overall picture is of a prolonged effort to remain in this country through the use of every possible delaying maneuver both administrative and judicial", the District Court properly denied the requested relief. Diaz appeals that decision claiming that his arrest by immigration officers violated his rights under the Fourth Amendment of the United States Constitution and claims that he did not waive the right to raise that issue anew on an administrative motion to reopen his deportation proceedings pursuant to 8 C.F.R. § 242.22 despite his concession of alienage and deportability at his original deportation hearing.

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* By order of Staff Counsel for the Second Judicial Circuit and pursuant to the Civil Appeal Scheduling order under the C.A.M.P. program of this Court appeal # 76-6132 and petition for review # 76-4223 have been consolidated such that they may be heard before the same panel of this Court (see Civil Appeal Scheduling Order, Docket No. 76-4223, dated October 20, 1976).

Petition for Review Docket No. 76-4223

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Diaz petitions this court for review an order entered by the Board of Immigration Appeals (the "Board") on October 13, 1976. That order dismissed the petitioner's appeal from the decision of an Immigration Judge denying Diaz' motion to reopen the deportation proceedings such that Diaz might raise a new objection to the legality of his arrest by immigration officers.

Similarly, as in Appeal # 76-6132, the alien alleges that his arrest on February 8, 1976 was illegal and that he is entitled to a new deportation hearing where he can challenge the validity of his apprehension. This petition for review seeking review of the Board's order was filed on October 18, 1976. Since the filing of this petition the alien has enjoyed the automatic stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act.

Statement of Facts

Juan Tomas Diaz-Chang is a forty-five year old native and citizen of Ecuador. He was admitted to the United States on April 1, 1971 as a nonimmigrant visitor for pleasure authorized to remain in this country until October 16, 1971 subject to the conditions of his nonimmigrant visitor visa.* He failed to depart at the expiration of

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* Diaz immediately violated the conditions of his temporary visa by engaging in unauthorized employment in April of 1971 at Lundy's Restaurant in Brooklyn, New York. See *Londono* v. *Immigration and Naturalization Service*, 433 F.2d 635 (2d Cir. 1969) (The acceptance of unauthorized employment by a nonimmigrant visitor causes him to lose his status and become deportable. 8 C.F.R. § 214.1(c)).

his authorized visitation and has been continuously and illegally residing and employed in the United States in violation of the law (AR. pp. 51-52).*

On February 8, 1976 immigration officers, pursuant to a search warrant issued in the United States District Court for the Eastern District of New York, apprehended Diaz while he was engaged in his illegal employment in Brooklyn, New York. On February 9, 1976 the Immigration and Naturalization Service commenced deportation proceedings against this alien with the issuance of an order to show cause and notice of hearing charging that he was deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) for having overstayed his legal visitation (AR. pp. 53-54). Diaz waived his right to more extended notice and requested a prompt hearing. His deportation hearing was therefore scheduled for February 10, 1976.

On February 10, 1976 Diaz appeared for his hearing before Immigration Judge Martin J. Travers. Prior to and during the deportation hearing Diaz was represented by privately retained and experienced counsel (AR. p. 63). An official interpreter was provided at Government expense to insure comprehension of the proceedings. During the deportation hearing Diaz conceded his alienage and deportability as charged in the order to show cause dated February 9, 1976 (AR. pp. 55-58, 86-89).

Prior to the hearing before Judge Travers the alien through his attorney and the Service Trial Attorney had reached a mutual settlement on the disposition of these immigration proceedings (AR. pp. 56, 88). In accordance with that agreement the Immigration Judge granted Diaz' application for the privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e). Judge Travers granted

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* References preceded by the letters "AR." are to the pages of the Certified Administrative Record previously filed with the Court.

Diaz 45 days to effect his voluntary departure and entered an alternative order of enforced deportation should the alien fail to effect his timely departure. The alien waived his right to appeal that decision to the Board and accordingly that decision became final (AR. pp. 58, 86). Diaz subsequently sought an extenson of this voluntary departure period to pursue labor certification under 8 U.S.C. § 1182(a)(14) such that he might subsequently obtain an immigrant visa. This request was denied because the alien's presence in the United States was not necessary for this procedure (AR. p. 85).

Despite the original grant of voluntary departure Diaz breached his agreement to leave the United States on or before March 26, 1976, and in complete disregard of his agreement with the Government and the order of Judge Travers, he continued his illegal residence in this country.

On March 29, 1976, pursuant to the alternative order of Judge Travers, the Service issued a warrant for Diaz' deportation (AR. p. 84). Nonetheless, the Service attempt to enforce this alternative order was blocked on March 31, 1976 when Diaz, by his present counsel, filed a petition for review pursuant to 8 U.S.C. § 1105a and thereby obtained an automatic statutory stay of deportation. Furthermore, the filing of this petition was totally without merit inasmuch as Diaz, by failing to appeal a decision of the Immigration Judge, had failed to exhaust his available administrative remedies. Therefore the jurisdictional prerequisites of 8 U.S.C. § 1105a(c) had not been satisfied and the petition should not have been filed.*

Having gained a stay of deportation by the filing of one frivolous petition the alien proceeded to further

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* On April 14, 1976 a preargument conference pursuant to the C.A.M.P. program of the Court was held before Staff Counsel Nathaniel Fensterstock. During that conference the Government's attorney noted the absence of jurisdiction and asked for the withdrawal of that petition (Docket No. 76-4094).

impede his removal from the United States by submitting an administrative application for a stay of deportation to the Service's District Director and a motion to reopen the deportation proceedings to an Immigration Judge (AR. pp. 81-83). Only after Diaz had orchestrated this new round of administrative applications and motions did the alien withdraw his first petition for review (AR. p. 59). On June 30, 1976 the Service's New York District Director denied Diaz' application for a stay and notified him to surrender for deportation on July 15, 1976 (AR. p. 60).

On July 14, 1976, only one day prior to his scheduled deportation such that the allegations Diaz made in support of a temporary restraining order could not be immediately verified or contradicted, Diaz filed an action for declaratory and injunctive relief in which he sought to stay his deportation, pending a decision on his administrative motion to reopen his deportation proceedings. In support of the motion for a preliminary injunction before the district court Diaz' attorney alleged that the alien's arrest was in violation of the Fourth Amendment, and further that Diaz had been given a deportation hearing in violation of 8 C.F.R. § 242.1(b).*

On August 3, 1976 Immigration Judge William B. Gurock denied Diaz' motion to reopen the deportation proceedings (AR. pp. 63-66). Rather than take a prompt

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* In support of the charge that the Service had violated 8 C.F.R. § 242.1 Diaz attached a photostatic copy of the reverse side of an Immigration and Naturalization Service Order to Show Cause and Notice of Hearing which if *true* would have indicated that he had not waived any right to more extended notice. In addition, the affirmative allegation that Diaz had not consented to a prompt hearing was made in the supporting affidavit of Linda Atlas, Esq., plaintiff's counsel, filed in the district court on July 14, 1976. These allegations were subsequently shown to be untrue at the hearing before Judge Ward on August 19, 1976.

appeal from the Immigration Judge's determination Diaz waited until August 18, 1976, one day before the hearing before Judge Ward in the District Court action, before even filing an administrative appeal before the Board (AR. p. 29).

On August 19, 1976 counsel for the respective parties appeared before Judge Ward for a hearing on Diaz' action for declaratory and injunctive relief. During that hearing plaintiff's counsel renewed the contention that the arrest of Diaz was illegal on the basis that the apprehending officers had no concrete information which would lead them to believe that there were persons subject to arrest on the premises described in the warrant, and further that Diaz' original deportation hearing was scheduled in violation of 8 C.F.R. § 242.1(b).

At the close of the hearing Judge Ward rendered a decision in which he denied Diaz' motion for a preliminary injunction and dismissed the underlying action. In his decision Judge Ward found that the alien's contentions relating to an illegal arrest, search and seizure were foreclosed under this Circuit's decision in *Miguel Avila-Gallegos* v. *Immigration and Naturalization Service*, 525 F.2d 660 (2d Cir. 1975), and further that Diaz had voluntarily waived his right to more extended notice under 8 C.F.R. § 242.1(b) prior to and at the commencement of the deportation hearing. Accordingly, the Court correctly found that the Service's district director had not abused his discretion in denying Diaz' administrative stay of deportation (AR. pp. 7-28).

Diaz was subsequently notified to surrender for deportation on October 6, 1976. On October 5, 1976, one day prior to his scheduled deportation, Diaz brought on, by order to show cause in the District Court, an application for a stay of deportation pending appeal. This application was denied by the District Court. On October 6, 1976 Diaz moved for a stay pending appeal in this court.

On October 13, 1976 the Board of Immigration Appeals dismissed Diaz' appeal from the decision of Immigration Judge Gurock on the alien's motion to reopen the deportation proceedings. In its decision the Board also rejected Diaz' claims relating to an illegal unlawful arrest and the waiver of any right to more extended notice. On October 18, 1976 Diaz filed his second petition for review, Docket No. 76-4223, again obtaining an automatic statutory stay of deportation.

ARGUMENT

POINT I

The District Court did not err in denying the motion for a preliminary injunction and in dismissing the underlying complaint.

In the District Court action for injunctive and declaratory relief Diaz sought to review the denial of his application for a stay of deportation pending the final administrative adjudication of a motion to reopen his deportation proceedings.* At the time this action was filed the alien's motion to reopen was pending before an Immigration Judge.** In support of his action Diaz claimed

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* The filing of a motion to reopen does not in and of itself act to stay the deportation of an alien. That relief must be sought from the Service's district director pursuant to 8 C.F.R. § 243.4 or directly from an Immigration Judge under 8 C.F.R. § 242.22.

** That motion to reopen was decided by Immigration Judge William Gurock on August 3, 1976 and the administrative appeal was dismissed on October 13, 1976 by the Board of Immigration Appeals. Inasmuch as the action before Judge Ward sought to stay deportation until the Board's decision on the motion to reopen it appears that the dismissal of the administrative appeal on October 13, 1976 mooted the issues raised in the underlying complaint and this appeal. Nonetheless, since the plaintiff-appellant has not withdrawn the appeal in this action a brief discussion will demonstrate the correctness of Judge Ward's decision below.

that he had not waived his right to more extended notice and therefore his deportation hearing was contrary to the provisions of 8 C.F.R. § 242.1(b).* Diaz claimed that the scheduling of his hearing on February 10, 1976 denied him fundamental due process which resulted in his inability to adequately consult with his lawyer and his inability to raise Fourth Amendment claims regarding the legality of his apprehension.

With respect to the alien's claim that his deportation hearing was scheduled in violation of 8 C.F.R. § 242.1(b) the District Court found that Diaz had in fact waived his right to more extended notice when he was served with the Order to Show Cause and again when he and his retained counsel proceeded with the hearing on February 10, 1976, without protest (AR. pp. 26, 53, 54, 56). Neither the representations forwarded by Diaz in support of his motion for a preliminary injunction (see affidavit of Linda Atlas, Esq., in support of Diaz' motion for a preliminary injunction) or the documents presented by him to the district court were accurate in this respect.**

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* 8 C.F.R. § 242.1(b) provides in pertinent part:
. . . The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing at a time and place stated in the order, not less than seven days, after the service of such order, except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may provide in the order for a shorter period. The issuing officer may, in his discretion, fix a shorter period in any other case at the request of and for the convenience of the respondent.

** See Transcript of Hearing dated August 19, 1976:
"Ms. Atlas: In this case there is an additional factor in that when my client was arrested, contrary to regulations, as I have stated in my papers, he was served with an order to show cause on the same day and he was given a

[Footnote continued on following page]

The Court also found that Diaz had conceded the only pertinent facts, alienage and deportability, at the hearing before the immigration judge which thereby mooted the plaintiff's belatedly conceived claims of illegal arrest, search, and seizure under *Avila Gallegos* v. *Immigration and Naturalization Service*, 525 F.2d 666 (2d Cir. 1975) (AR. p. 11):

> "The Court: Well, if the arrests at that time were illegal by virtue of there being no concrete evidence, but they were prior in time to the arrest

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deportation hearing the following day. That intervening period, which was rather a short period, resulted in his inability to actively consult with counsel as another applicant in the same case did, Mr. Eric Barnett did, who made the resulting motion. He would be at least entitled to another deportation hearing at which we could make the proper application and obtain the privilege of voluntary departure. He does have certain underlying equities which would necessitate that.

Even if your Honor found the search itself was not necessarily invalid——

The Court: On that score you committed an unpardonable sin, so far as this Court is concerned, by apparently attaching to your papers only a portion of the material in question. I have in front of me as part of the exhibit B attached to the government's papers——

Ms. Atlas: To the government's papers?

The Court: Yes—a document which three-quarters of the way down, bearing the signature of your client, witnessed by an officer, states:

'Request for prompt hearing to expedite determination of my case, I request an immediate hearing and waive any right I may have to more extended notice.'

There is a signature which is purportedly that of your client. There is a date, and I suggest that you tell us that constitutes a waiver. That is reinforced by the fact that on the following day when the hearing took place your client appeared with his retained counsel and proceeded with the hearing without protest."

> of your client, it could well be argued that the information obtained on the earlier occasion would suffice to make the later visit appropriate, and though the people who might have some arguments regarding a first visit might have standing in their cases to contest that, it would seem that a person arrested the second time after certain things had been observed would have far less in the way of a standing, but I think this is really beside the point in view of the language of the United States Court of Appeals for the Second Circuit in Miguel Avilas-Gallegos v. the Immigration and Naturalization Service, slip opinion of November 7, 1975, beginning at page 6405, and what particularly should be focused upon is the statement in Judge Van Graaafeiland's opinion at 6407:
>
> > 'Assuming arguendo that petitioner's arrest was technically defective, it does not follow that the deportation proceedings were thereby rendered null and void.'
>
> And he goes on with some discussion. It does seem that that case limits your arguments in this regard."

It is clear from the record before Judge Ward that the District Director's denial of a stay pending the motion to reopen was a proper exercise of administrative discretion. Diaz clearly waived any right to more extended notice as well as any right to raise new Fourth Amendment claims. Furthermore, even if the District Director and the District Court were to assume *arguendo* that the apprehension was defective, no purpose would be derived by reopening the administrative hearings. Diaz seeks to suppress statements resulting from his

arrest but no statements were introduced at the hearing. His alienage and deportability has been established by his own admissions. Quite simply there is no evidence to suppress.

It is therefore submitted that the District Court below properly followed the limited scope of review applicable under the abuse of discretion test. See *Bolonos* v. *Kiley*, 509 F.2d 1023 (2d Cir. 1975). The Court properly declined to overturn the decision of the district director where that decision contained a rational basis and did not inexplicably depart from established policies or rest on an impermissible basis. See *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 751 (2d Cir. 1966). Accordingly, the decision of the district court should be affirmed on this appeal.

POINT II

The Board of Immigration Appeals did not abuse its discretion in denying the alien's motion to reopen the deportation proceedings.

A. The reopening of a deportation proceedings is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act, has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 242.22, provides in pertinent part that motions to reopen "will not be granted unless the Special Inquiry Officer is satisfied that evi-

dence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally, 8 C.F.R. § 103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. § 3.8.

Clearly, the regulations contemplated that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. The Alien's Motion to Reopen

In his motion to reopen the deportation proceedings Diaz claimed that his original hearing was scheduled in violation of 8 C.F.R. § 242.1(b); that his arrest was illegal; that his interrogation resulted in statements which were used against him at the deportation hearing in violation of the Fourth and Fifth Amendments; and that he should be granted a new hearing where he might be permitted to move for suppression of any evidence obtained in violation of his rights under the Constitution and laws of the United States (A.R. pp. 81-83). It is submitted that Diaz' motion to reopen failed to comply with even the basic mandatory requirements of 8 C.F.R.

§ 103.5 and § 242.22; recited inaccurate allegations; and was totally lacking in merit.

Under 8 C.F.R. § 103.5 a motion to reopen must state new facts which are supported by affidavits or other evidentiary material. The motion submitted by Diaz clearly failed to meet this mandatory requirement. No evidentiary material whatsoever was submitted by the alien in conjunction with this motion to reopen. Instead, the motion merely requested that the proceedings be reopened to allow his counsel to *introduce* new evidence in support of the allegations contained in his motion. This Court has unequivocally stated that a mere motion to reopen, unaccompanied by the evidentiary proof required under 8 C.F.R. § 103.5 is insufficient to warrant reopening of the proceedings. *Acevedo* v. *Immigration and Naturalization Service*, 538 F.2d 921 (2d Cir. 1976).*

Furthermore, the motion papers submitted by Diaz contain basic factual inaccuracies which indicate that the motion was totally without merit. Contrary to the inaccurate assertion in his motion to reopen, no statement obtained from Diaz was ever introduced at his hearing. As in *Avila-Gallegos*, *supra*, alienage and deportability were established solely by the alien's voluntary concessions during the course of his deportation hearing. Nor did the warrant fail to specifically name Diaz as one of the aliens believed to be residing illegally in the United States, as was represented in his motion to reopen.

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* In discussing this requirement this Circuit has noted that any lesser requirement would allow all deportations to be permanently frustrated by the mere filing of successive petitions to reopen. See *Acevedo*, *supra*, at 920 citing *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003.

Finally, the original deportation hearing was not conducted in violation of 8 C.F.R. § 242.1(b) as asserted in the motion papers. In making this inaccurate assertion to the Immigration Judge, Diaz conspicuously failed to admit that prior to the hearing he had signed the request for a prompt hearing printed on the reverse side of the administrative order to show cause and notice of hearing (AR. pp. 53-54). Diaz also failed to recite that prior to that hearing he, with his privately retained counsel, had already sought and obtained an agreement with the Government whereby he received the privilege of voluntary departure in lieu of deportation. Having entered into that agreement and having been granted voluntary departure, the only discretionary consideration for which he was entitled, Diaz conceded his alienage and deportability as charged.

Diaz' motion also failed to comply with 8 C.F.R. § 242.22 in that he did not demonstrate that the evidence he sought to offer was unavailable or could not have been discovered or presented at his original hearing on February 10, 1976. The facts surrounding his apprehension were available at the time of his deportation hearing. Diaz could have sought an adjournment at that time in order to present any such claims. Instead, with his attorney, he chose to enter into an agreement with the Service trial attorney and thereby waived any right to assert these issues at a later time.

Finally, and most important, even if an Immigration Judge, the Board of Immigration Appeals, and this Court were to assume *arguendo* that Diaz' apprehension was defective that assumption would not warrant the reopening of his deportation proceedings. There cannot be any doubt that irregularities in the arrest do not vitiate an order of deportation when that order is, as here, properly substantiated. This generally has long been recognized by the Supreme Court, and has been

repeatedly upheld in cases involving deportation proceedings. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *Miguel Avila-Gallegos* v. *Immigration and Naturalization Service, supra; LaFranca* v. *Immigration and Naturalization Service*, 413 F.2d (2d Cir. 1969); *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245 (7th Cir. 1974); *Huerta-Cabrera* v. *Immigration and Naturalization Service*, 466 F.2d 759, 761 (7th Cir. 1972); *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F.2d 1180 (8th Cir. 1973); *Vlissidis* v. *Anadell*, 262 F.2d 398 (7th Cir. 1959); See *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966); See also *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). In *Vlissidis* v. *Anadell*, *supra*, at 400, the court observed:

> Evidence obtained as the result of an unlawful arrest may be suppressed, but we know of no authority for holding a deportation proceeding such as we are here considering to thus become null and void.

and in *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966) the court specifically held, in the face of a challenge comparable to that in the instant case, that the deportation order was adequately supported by untainted evidence. Even if an arrest was illegal, the mere fact that the authorities got the "body" of an alien illegally would not make the proceeding to deport him the fruit of the poisonous tree. *Huerto-Cabrera* v. *Immigration and Naturalization Service*, *supra* at 761.

If the rule were otherwise, aliens in the petitioner's position could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective. *Arbiol* v. *Immigra-*

tion and Naturalization Service, 73 Civ. 344 (March 6, 1972) (Frankel, *J.*). No such absurd result is required or contemplated by the Act or the Constitution.

The petitioner was found deportable as an alien who had been admitted as a nonimmigrant visitors for pleasure who remained in the United States beyond the terms of his visa. At the deportation hearing before an Immigration Judge the petitioner voluntarily conceded that the factual allegations contained in the Order to Show Cause, *i.e.*, that he was admitted solely as a nonimmigrant for pleasure authoribed to remain in the United States until April 1, 1971, and that he remained beyond that date without authority. Thus the order for the petitioner's deportation resulted from his own admissions at the deportation hearing and while he was represented by experienced counsel. Compare, *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966). As in *LaFranca, supra*, Diaz' deportability was conceded at the hearing. The Service did not rely upon any statement taken or evidence seized at the time of his arrest. Inasmuch as there was no evidence other than his own admissions at the hearing there is nothing to suppress. Under these circumstances it would be absurd to permit Diaz to reopen his proceedings in order for him to move to suppress "his arrest and subsequent statements" which he now claims are the fruit of an illegal search. See Plaintiff-Appellant's brief at p. 13.

POINT III

This appeal and petition are Frivolous and Dilatory, warranting the award of just damages and double costs.

In dismissing the complaint for declaratory and injunctive relief the District Court below noted:

> "Defendant, in opposing the application for a preliminary, has stated that plaintiff is merely attempting another dilatory maneuver in order to frustrate the administrative determination proceedings against him (Affidavit of Thomas H. Belote, sworn to August 17, 1976 at paragraph 16.)
>
> The Court agrees with this conclusion. The overall picture is of a prolonged effort to remain in this country through the use of every possible delaying maneuver, both administrative and judicial."

We submit that the appeal from Judge Ward's decision and the subsequent filing of Diaz' second petition for review are additional examples of Diaz' bath faith and dilatory action. The overall picture is simply a matter of a non-immigrant visitor enjoying the privileges and comforts of the United States having no intention or desire to leave despite the fact that he previously entered into an agreement with the Government in which voluntary departure was granted in lieu of enforced deportation.

From the point when the Service's district director refused to grant Diaz additional time such that he could pursue a labor certification and remain in the United States pending the issuance of an immigrant visa Diaz

has consistently engaged in a pattern of conduct that involved deceit, delay, and breach of faith.* Having been denied additional time by the District Director on March 29, 1976, Diaz immediately thereafter filed a petition for review which was jurisdictionally defective. Nonetheless, Diaz obtained the relief he sought: Additional time by reason of the automatic stay provisions of 8 U.S.C. § 1105a.

Diaz next proceeded with a new round of administrative motions. From the district directors denial of a stay he filed the district court action before Judge Ward and subsequently this appeal. From the immigration judge's denial of the motion to reopen he proceeded with appellate review before the Board of Immigration Appeals and thereafter the instant petition.

By filing the district court action and subsequently refusing to surrender for deportation after his complaint was dismissed Diaz won the fruits of victory despite the fact that his case had no merit. He thereby secured enough time to file another frivolous action, a second petition for review, and obtain a new automatic stay of deportation. Compare *Jimenez* v. *Barber*, 252 F.2d 550, 553 (9th Cir. 1958).

The instant appeal and petition are frivolous. Given what we consider to be the evident insubstantiality of

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* Extensions of voluntary departure for the purpose of pursuing an immigrant visa are inconsistent with Service policy and the failure to depart within the initial period set by an immigration judge is in and of itself a sufficient ground for the denial of additional discretionary relief. See *Fan Wan Keung* v. *I.N.S.*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel Lee Pao Fen* v. *Esperdy*, 423 F.2d 6 (2d Cir. 1970).

grounds for these actions we submit that there can be no objective reason for their filing other than to allow the alien to enjoy the benefits of a further stay of deportation. Section 106(a)(3) of the Act; 8 U.S.C. § 1105a (a)(3).

Accordingly, damages and double costs should be awarded to the Government pursuant to the provisions of 28 U.S.C. § 1912 and Rule 38, Fed. R. P. Such sanctions are of course discretionary with the Court and that discretion has been exercised only with the greatest of care. No case, however, in our opinion appears more compelling than this for the imposition for such sanctions. The inconvenience to the District Court, the defendant-respondent and this Court alone more than justify such award.

The Second Circuit has found that Section 1912 and Rule 38 Sanctions are appropriately imposed when a petition for review utterly frivolous and completely lacking in merit is interposed solely as a delaying tactic. *Acevedo* v. *I.N.S.*, 538 F.2d 918 (2d Cir. 1976). We submit that Judge Ward's finding as to the frivolous dilatory nature of these proceedings is entirely correct and that the abuse of both the administrative and judicial process in this matter exceed that which was demonstrated in *Acevedo*.

As in *Acevedo*, this alien is seeking to reopen a previously deportation proceeding where alienage and deportability were conceded and the privilege of voluntary departure was granted. In both actions the alien did not appeal from the original finding of deportation and it accordingly became final. See 8 C.F.R. § 242.20. In both cases the aliens subsequently petitioned this Court to review the decision of the Board of Immigration Appeals which denied their motion to reopen. In both cases the aliens failed to comply with the basic requirements

of 8 C.F.R. §§ 103.5, 242.22. In both cases the facts sought to be presented could have been presented at the original deportation hearing. 8 C.F.R. § 242.22. In both cases, the petitioning individuals failed to comply with the evidentiary requirement of 8 C.F.R. § 103.5. In this case Diaz submitted no evidence whatsoever and many of the claims he made were at best inaccurate. The petition in *Acevedo* was obviously frivolous but at least it was her first.

The instant petition is before this Court solely by reason of a previously filed and jurisdictionally defective petition for review and a declaratory judgment action which the district court found to be totally frivolous and dilatory in nature. Solely by the use of these previous actions was Diaz able to prolong his illegal sojourn until an Immigration judge and the Board could rule on his new round of administrative motions. Having successfully achieved that delay Diaz was able to file a new petition in hopes of further delay. At least in *Acevedo* this delay was not achieved by blatant inaccuracies and multiple litigation. Such an abuse of the judicial process has been a matter of concern and this Court has been willing to employ sanctions as a means of preventing the needless waste of the Court's time and resources, *Acevedo, supra; Fluoro Electric Corp.* v. *Branford Associates*, 489 F.2d 320, 326 (2d Cir. 1973); See also *Panagopoulos* v. *I.N.S.*, 434 F.2d 602 (1st Cir. 1970).

The petitioner has abused the process of the I.N.S. and of this Court. We submit that damages and double costs would be an appropriate award to respondent pursuant to 28 U.S.C. § 1912 and Rule 38, Fed. R. App. P.*

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* The awarding of costs could, of course be imposed on petitioner's counsel. 28 U.S.C. § 1927. Should the Court wish to pursue this alternative it might be appropriate to first conduct a hearing. See *Hanley* v. *Condrey*, 467 F.2d 697, 700 (2d Cir. 1972).

See, e.g., *Fluoro Electric Corporation* v. *Brandford Associates*, *supra*, (appellee was awarded damages in the amount of $4,500 and costs in the amount of $589.70 by the Second Circuit citing Rule 38); *Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.*, 422 F.2d 1278, 1283-84 (2d Cir. 1970) (Second Circuit awarded four per cent interest on judgment, double costs and $7500 in attorneys fees citing both Section 1912 and Rule 38); *N.L.R.B.* v. *Smith & Wesson*, 424 F.2d 1072 (1st Cir. 1970) (First Circuit citing Rule 38 awarded government agency $500 for expenses in addition to its regular costs); *Gullo* v. *Hirst*, 332 F.2d 178 (4th Cir. 1964) Fourth Circuit remanded for imposition of attorney's fees and sanctioning of plaintiff-appellant's counsel); *Ginsberg* v. *Stern*, 295 F.2d 698 (3rd Cir. 1961) (Third Circuit citing Section 1912 awarded to appellee costs and $500 on account of counsel fees and other expenses); *Lowe* v. *Willacy*, 239 F.2d 179 (9th Cir. 1956) (Ninth Circuit citing Section 1912 awarded appellee double [court] costs, attorney's fees and printing costs, the latter two amounts to be shown by appellee's affidavit to be filed with the Clerk); In re *Midland United Co.*, 141 F.2d 692 (3rd. Cir. 1944) (Third Circuit awarded appellees damages for printing costs and $1000 for counsel fees citing Section 878, the precursor to Section 1912). At such time as the Court may direct we will submit an itemization of our costs and the attorneys' time expended on this case.

CONCLUSION

It is respectfully requested that the petition herein be dismissed and that the respondent be awarded damages and double costs occasioned by the defense of this action.

Dated: New York, New York
November 19, 1976

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA76-6132
CA 76-4223

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 6th day of December, 1976 she served two copys of the within Brief of Defendant-Appellee, Respondent

by placing the same in a properly postpaid franked envelope addressed:

Linda Atlas, Esquire
16 Court Street
Brooklyn, New York 11241

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

6th day of December, 1976

Ralph L. Lee

Notary Public, State of New York
No. 41-
Qualified in Kings County
Term Expires March 30, 1977